IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE ex rel. NON-PARTY HUGH GRANT,	)	**Case No. _____**
Relator,	)	**Circuit Court of Jackson County, Missouri at Kansas City**
vs.	)	**Cause No. 1816-CV17026**
THE HONORABLE CHARLES H. MCKENZIE,	)	**Division No. 13**
Respondent.	)	

RELATOR NON-PARTY HUGH GRANT'S PETITION FOR PRELIMINARY ORDER IN AND PERMANENT WRIT OF PROHIBITION

Relator Hugh Grant, for his Petition for Preliminary Order In And Permanent Petition for Writ of Prohibition, states:

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this Petition for Writ pursuant to Article V § 4.1 of the Missouri Constitution.

INTRODUCTION

This petition arises from ongoing product liability litigation alleging that Defendant Monsanto's Roundup® product causes Non-Hodgkin's Lymphoma. Relator Hugh Grant retired as the CEO of Monsanto in June 2018.[1] While CEO of Monsanto, Mr. Grant had limited involvement with the subjects at issue in this litigation and developed no unique knowledge as to them. What knowledge Mr. Grant has was exhaustively explored during

[1] Monsanto became an indirect subsidiary of Bayer AG in June 2018.

a five-hour deposition noticed by a group of plaintiffs' counsel that includes the former firm of Plaintiff's counsel, David Wool. Despite these facts, on March 31, 2022, Respondent ordered Mr. Grant to appear and give testimony in the May 2, 2022 trial of the claims of Plaintiff Allan Shelton.

This ruling was in excess of Respondent's authority and an abuse of discretion.

First, in response to a subpoena issued in the Roundup® MDL litigation—litigation that presents issues identical to those presented by this case—Mr. Grant appeared voluntarily for a five-hour deposition during which his knowledge of the subjects at issue were comprehensively examined. Thus, to the extent Mr. Grant had any relevant testimony, that testimony is preserved and available for Plaintiff's use in this case. Notably, Roundup® plaintiffs have played portions of Mr. Grant's deposition in a prior trial.

Second, although Mr. Grant is retired, the Missouri Supreme Court's holding in *Messina* remains applicable where, as here: (1) the information sought in the testimony deposition could be obtained through less intrusive means, (2) plaintiff's need for the testimony is slight, and (3) there will be significant burden, expense, annoyance, and oppression to Mr. Grant if he is compelled to appear for trial. *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d at 607-08 (Mo. banc 2002).

Third, setting the precedent that Mr. Grant must appear and testify at Roundup® trials would be beyond burdensome and oppressive, because requiring Mr. Grant's presence and testimony at this trial could open the floodgates to similar trial subpoenas in dozens of cases.

A writ should issue because an appeal is not an adequate remedy. A writ of prohibition is a proper remedy to "prevent a court from enforcing obedience to or ordering compliance with an improper subpoena." *State ex rel. Ellis v. Schroeder*, 663 S.W.2d 766, 770 (Mo. App. 1983). Prohibition is also the proper remedy for an abuse of discretion in connection with an order compelling the testimony of a top-level executive. *Messina*, 71 S.W.3d at 607 (citation omitted).

For all of these reasons, the Court should issue a writ of prohibition barring Respondent from doing anything other than granting Relator's motion for a protective order in full.

FACTUAL AND PROCEDURAL BACKGROUND

1. Mr. Grant began serving as Chairman and Chief Executive Officer of Monsanto in 2003 and retired when Monsanto became an indirect subsidiary of Bayer AG. in June 2018. *See* Grant Decl. (Ex. A, at 11, ¶ 2).

2. Mr. Grant is not employed by Bayer and he has no financial ties to Monsanto or Bayer. *Id*. ¶ 3.

3. Mr. Grant is not a toxicologist, an epidemiologist, or a regulatory expert and he did not work in the areas of toxicology or epidemiology while employed at Monsanto. *Id*. ¶ 4.

4. Mr. Grant does not have any expertise in the studies and tests that have been done related to Roundup® generally, including those related to Roundup® safety. *Id*. ¶ 5.

5. Defendant has not asked Mr. Grant to testify live in any scheduled Missouri Roundup® trial. Ex. A, at 12, ¶ 9.

6. Mr. Grant has no personal knowledge of the particular Plaintiffs in this matter, including Plaintiff Allan Shelton. Ex. A, at 11, ¶ 6.

7. There are numerous Roundup® lawsuits pending in the United States. Some of these cases have been consolidated in the United States District Court, Northern District of California, before the Honorable Vince Chhabria in *In re: Roundup Products Liability Litigation*, MDL No. 2741.

8. One of Plaintiff's attorneys in this matter—David Wool—was, until very recently, a partner at Andrus Wagstaff, PC. Mr. Wool's former partner, Aimee Wagstaff, served as Co-Lead Counsel in the Roundup® MDL. *In re: Roundup Prods. Liab. Litig.*, MDL No. 2741, Doc. 62 (Dec. 7, 2016) (Pretrial Order No. 4: Plaintiffs' Leadership Structure) (Ex. B, at 1, ¶ I). As is common, the MDL court expects coordination with state court actions. Ex. B, at 3, ¶ III.4.[2]

9. The parties in this case have agreed to use discovery and deposition materials from the MDL "as if it were conducted in this action." *Shelton, et al. v. Monsanto Co.*, 1816-CV17026, ¶ 4 (Feb. 2, 2021) (Amended Case Management Order) (Ex. A at 15 ¶ 4).

10. On February 4, 2019, two attorneys representing the MDL plaintiffs (Mr. Michael Miller and Mr. Brent Wisner) deposed Mr. Grant for approximately five hours. *See* Ex. A, at 12, ¶ 7.

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[2] The Court of Appeals "may take judicial notice of the records of other cases when justice so requires." *Muhammad v. State* 579 SW3d 291, 293 n4 (Mo. App. WD 2019) (citing *Vogt v. Emmons,* 158 S.W.3d 243, 247 (Mo. App. E. D 2005).

11. To Relator's knowledge, there is no record of ***any witness*** deferring to Mr. Grant in any of these depositions as the only person with knowledge about any particular topic or even referring to Mr. Grant as a potential source of information relevant to this litigation.

12. On January 1, 2022, Plaintiff in this case served a trial subpoena on Mr. Grant, commanding that he appear for the February 1, 2022 trial to testify on behalf of Plaintiff Allan Shelton. Ex. A, at 20.

13. On January 11, 2022, Mr. Grant filed a motion for a protective order barring Plaintiff from subpoenaing him to testify at trial. Ex. A. Plaintiff filed his opposition on January 21, 2022. Ex. C.[3] On February 9, 2022, Mr. Grant filed his reply. Ex. D.

14. On February 28, 2022, Respondent entered a Third Amended Scheduling Order, which continued the trial to May 2, 2022. *Shelton, et al. v. Monsanto Co.*, 1816-CV17026 (February 28, 2022).

15. On March 4, 2022, Respondent heard argument on Mr. Grant's motion. Ex. F.

16. On March 9, 2022, Plaintiff filed a trial subpoena commanding Mr. Grant to appear and give trial testimony on May 6, 2022. Ex. G, at 7.

[3] On March 3, 2022, Plaintiff filed under seal Exhibits 3, 5, 7-11, and 14 to his opposition. Ex. E at 3-36. On March 24, 2022, Plaintiff filed under seal Exhibit 2 to his opposition. Ex. E at 1-2.

17. On March 9, 2022, at the request of Respondent, counsel for Mr. Grant emailed to Respondent's Judicial Law Clerk a copy of Mr. Grant's MDL Deposition Transcript. Ex. H.

18. On March 31, 2022, Respondent denied Mr. Grant's motion for a protective order. Ex. I.

19. This case is one of 14 similar cases that are currently set for trial in Jackson County, St. Louis County or St. Louis City (including five cases involving Plaintiff Shelton's attorneys)

20. Jackson County, St. Louis County or St. Louis City have numerous similar cases that are awaiting trial settings.

REASONS FOR GRANTING RELIEF

21. The Court should issue a preliminary order and permanent writ of prohibition barring Respondent from doing anything other than granting Relator's motion for a protective order in full, for three reasons.

22. ***First***, Mr. Grant appeared on February 4, 2019—eight months after his retirement from Monsanto—for a five-hour videotaped deposition, during which his knowledge of the subjects at issue were comprehensively examined. Ex. H. In fact, Mr. Grant's deposition testimony was taken for and played by video at the MDL trial. The issues and legal theories in this case and the case that went to trial in the MDL are identical. And Plaintiffs' counsel in this matter—David Wool—was a member of the firm that served as Co-Lead Counsel in the Roundup® MDL and that had the opportunity to depose Mr. Grant.

23. As Mr. Grant's MDL deposition makes clear, he had only general and high-level knowledge of the issues central to this litigation. Mr. Grant is not a toxicologist, an epidemiologist, or a regulatory expert and Mr. Grant did not work in the areas of toxicology or epidemiology while employed by Monsanto. Ex. A, at 11 ¶ 4. In their opposition, Plaintiff points to eleven documents (out of more than 20 million pages of documents produced by Monsanto) that he asserts show that Mr. Grant was an "active participant" and "decision-maker" in all things Roundup®. Ex. C at 4-7. But in his reply brief, Mr. Grant examines each of these eleven documents and highlights how they show the opposite: Mr. Grant was merely being kept informed and at most offering high-level suggestions; others at Monsanto (many of whom have been deposed) were responsible for the actual oversight and decision-making related to Roundup®. Ex. D at 3-7.

24. Respondent found that "exhibits presented show that the witness has information that can be considered allegedly material to the Plaintiff's case, for which he was personally and directly involved, and for which only he can answer." Ex. I at 3. But the exhibits or their substance have already been addressed in Mr. Grant's MDL deposition. Ex. D at 3-7. And Mr. Grant's deposition testimony shows that he is not the only person who can address these documents and topics. For example, Mr. Grant provided testimony about his 2016 interview on public radio—and specifically about his comments concerning Roundup®, and classification of glyphosate (the active ingredient in Roundup®) as probable carcinogen by IARC—at his MDL deposition. *See* Ex. C at 23-30; Ex. D at 4; Ex. H at 43:24-45:20. Moreover, Sam Murphey, Monsanto's corporate witness, was deposed in the MDL and asked about Monsanto's public response to IARC's plan to classify

glyphosate as a probable carcinogen and related media efforts. Additionally, there is nothing unique about the statements Mr. Grant made during the 2015 earnings call, or any other earnings call. *See* Ex. C at 32-60; Ex. D at 5. As is common practice for senior executives, Mr. Grant's remarks about Roundup® and IARC's classification of glyphosate as a probable carcinogen were synthesized from a variety of different sources within Monsanto—sources who, unlike Mr. Grant, actually had knowledge of the subjects addressed in the call. Mr. Grant's statements were not based on his own unique personal knowledge. Moreover, at his MDL deposition, Mr. Grant was examined extensively about IARC's classification of glyphosate – the same issue he briefly addressed on this call. Ex. H at 52:20-53:19; 110:15-20; 112:10-114:8. Finally, Mr. Grant was examined about the EPA at his deposition and provided substantive deposition testimony about his communications with the EPA. Ex. H at 56:15-61:2. Neither the Order nor Plaintiff explain why this testimony is insufficient or what other information they think that Mr. Grant uniquely possesses on this point.

25. During oral argument, counsel for Plaintiff stated that they need to ask Mr. Grant about "his personal knowledge, the decisions he made, why he made them, why he attached IARC, what he recommended to the Board." Ex. F at 30:16-19. Plaintiff's counsel went on to state, "if we're not able to call him live at trial and we ask why these decisions were made … we can't ask anybody." Ex. F at 30:21-24. But Plaintiff ignores that these very questions were asked at Mr. Grant's MDL deposition and, based on Mr. Grant's testimony and the exhibits Plaintiff references in his opposition, Mr. Grant is definitively not the only person who can speak to why decisions were made.

26. Respondent's Order notes that Mr. Grant's MDL deposition was taken by attorneys who do not appear to have any connection to the case at bar. Ex. I at 3. However, Plaintiff's counsel, including Mr. Frazer and Mr. Onder, have cases in the MDL that closely track the claims made by Plaintiff Shelton and Mr. Grant's MDL testimony was taken for use in all MDL cases. *Compare* First Am. Pet. at ¶¶ 84-181, *Shelton, et al. v. Monsanto Co.*, 1816-CV17026 (July 8, 2019) (bringing claims of Strict Liability (Design Defect); Strict Liability (Failure to Warn); Negligence; Fraud, Misrepresentation, and Suppression; Violation of Missouri Merchandising Practice Act; Breach of Warranties; Breach of Implied Warranty of Merchantability) *with* MDL 3d Am. Compl. at ¶¶ 114-170 *In re: Roundup Products Liability Litigation*, MDL No. 2741 (bringing claims that include Strict Liability (Design Defect); Strict Liability (Failure to Warn); Negligence/Negligent Misrepresentation). Moreover, Plaintiff's counsel, David Wool, was substantially involved in the MDL and was with the same firm as the MDL leadership at the time of Mr. Grant's MDL deposition. Therefore, the interests of Plaintiff's counsel aligned with the interests of the MDL leadership and with the interests of the attorneys who took Mr. Grant's MDL deposition.

27. ***Second***, although Mr. Grant is retired, the Missouri Supreme Court's holding in *Messina* remains applicable where, as here: (1) the information sought in the testimony deposition could be obtained through less intrusive means, (2) plaintiffs' need for the testimony is slight, and (3) there will be significant burden, expense, annoyance, and oppression to Mr. Grant if he is compelled to appear for trial. *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d at 607-08 (Mo. banc 2002); *see also Wilkins v. Office of Mo. Att'y*

Gen., 464 S.W.3d 271, 276-77 (Mo. App. 2015) (applying *Messina* to trial subpoenas and affirming trial court's finding of good cause to quash trial subpoena directed at the state attorney general because there was no evidence that he had any first-hand "involvement in or knowledge of [the] employment decisions" at issue in the suit and lower-level state employees were more appropriate witnesses); *Rosen v. Smith Barney, Inc*., No. A-5268-02T2, 2004 WL 6400515, at *2-3 (N.J. Super. Ct. App. Div. Feb. 10, 2004) (reversing order compelling deposition of chairman of corporation who did not have "unique or superior personal knowledge of discoverable information" and whose testimony would be redundant of that provided by other witnesses).

28. As discussed above, Plaintiff has already pursued and obtained extensive discovery related to Mr. Grant's knowledge in this litigation. He was deposed in the MDL, that deposition transcript and video can be used at trial, and any trial testimony would mirror his deposition testimony. Moreover, Plaintiff has no need for Mr. Grant's trial testimony. Mr. Grant's MDL deposition testimony is comprehensive and he has no knowledge of facts that are unique to Plaintiff Allan Shelton. To the extent that Counsel has questions that were not asked at Mr. Grant's MDL deposition, those questions can be asked to the company witness(es) who are presented at trial. *Messina*, 71 S.W.3d. at 606-8 (Granting a protective order where "[p]ersons lower in the organization [] have the same or better information" than a top-level executive targeted for a deposition and where there would be "significant burden, expense, annoyance and oppression to" the executive in allowing the deposition of the top-level executive to proceed.). Finally, as further explained below, setting the precedent that Mr. Grant must appear and testify at Roundup®

trials would be beyond burdensome and oppressive. Thus, Mr. Grant's trial testimony is unwarranted under *Messina*.

29. ***Third***, setting the precedent that Mr. Grant must appear and testify at Roundup® trials would be beyond burdensome and oppressive.

30. Respondent's Order fails to address Mr. Grant's argument that a protective order is necessary to protect him from "annoyance, embarrassment, oppression, or undue burden or expense" under Mo. Sup. Ct. R. 56.01(c)(1). The only reason Plaintiff now seeks Mr. Grant's trial testimony—which will be substantively identical to his prior testimony—is to create an undue burden, expense, annoyance or oppression. The annoyance, oppression, and undue burden or expense results the minute Mr. Grant is forced to appear to give trial testimony when he has already been fully and adequately deposed on the issues in this case. That is especially true in light of his scant relevance to the issues at hand. Moreover, the assessment of annoyance, oppression, and undue burden and expense is not done in a vacuum. Rather, "[a] protective order should issue if annoyance, oppression, and undue burden and expense ***outweigh the need for discovery***." *Messina*, 71 S.W.3d at 607 (emphasis added). Here there is ***no need*** for this trial testimony. Therefore, ***any*** annoyance, oppression, or undue burden and expense outweighs plaintiffs' need and a protective order should issue.

31. Here, Mr. Grant has already provided ample testimony in the Roundup® litigation and compelling him to testify live at trial in this litigation presents him with the risk of a substantial, ongoing burden. This case is one of 14 similar cases that are currently set for trial just in Jackson County, St. Louis County or St. Louis City. Additionally, these

counties have dozens of similar cases that are awaiting trial settings. If Mr. Grant is compelled to attend and testify at this trial, it potentially subjects him to similar subpoenas in all 14 cases[4] and in any cases that are set for trial in the future. That is an unwarranted imposition on a non-party witness with little (if any) involvement in the issues that are the subject of these trials.

32. A protective order should issue where necessary to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Mo. Sup. Ct. R. 56.01(c). In short, there is no purpose – other than to annoy, embarrass, oppress, and subject Mr. Grant to undue burden and expense – for seeking Mr. Grant testimony at this trial. For this reason, too, Respondent exceeded his authority and abused his discretion in denying Mr. Grant's request for a protective order.

33. Writ relief is appropriate in this context because Relator has no adequate remedy on appeal after trial. As discussed above, the harm posed by Respondent's order is the burden, expense, annoyance and oppression inherent in compelling an individual to testify at trial based on his role as a former CEO of a major corporation when he has already been fully and adequately deposed on the issues in this case. An after-the-fact appeal would not supply any relief for these injuries.

RELIEF SOUGHT

For the foregoing reasons and the reasons set forth more fully in Relator's accompanying Suggestions in Support of his Petition for Writ of Prohibition, Relator

[4] Combined, these 14 cases have hundreds of plaintiffs.

requests that this Court issue a preliminary order in and permanent writ of prohibition directing Respondent to take no further action other than granting Relator's motion for a protective order in full and quashing Plaintiffs' trial subpoena.

DATED: April 8, 2022

Respectfully submitted,

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