

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

TOBY HARMON, SHANE DODSON,
and TAMMI DODSON, as
individuals,

Plaintiffs,

v.

Case No. CIV-18-688 HE

CITY OF NORMAN OKLAHOMA,
JEFF ROBERTSON, in his individual
capacity acting as a police officer for
the CITY OF NORMAN,
OKLAHOMA, DOES 1-5,

Defendants.

**COMBINED MOTION TO STRIKE
AND MOTION FOR PROTECTIVE ORDER**

This Motion tenders the following issue for this Court's consideration:

Plaintiffs list Defendants' lead counsel as a witness on their Witness and Exhibit List [Doc. Entry No. 51]. Plaintiffs have also filed a Notice to take Defendants' lead counsel's deposition and issued a Subpoena to Testify in a Civil Action to Defendants' lead counsel. Can Plaintiffs' establish the factors set forth in *Boughton v. Cotter Corp.*, 65 F.3d 823 (10th Cir. 1995)?

BACKGROUND

In this action, Plaintiffs' challenge the constitutionality of § 15-503 of the City's Ordinances. On their witness list, Plaintiffs name Defendants' lead counsel as a witness. Plaintiffs' Witness List [Doc. Entry No. 51] at pg. 3, ¶ 7. Plaintiffs contend that Defendants' lead counsel will testify as follows:

He will testify regarding the 2016 agreement with Plaintiff Harmon that would allow Harmon to use his plastic hand-held cone in the future without additional citation under the City's code Section 15-503.

Id. The following facts are germane to the issues raised in this Motion:

1. In their Verified Complaint [Doc. Entry No. 1], Plaintiffs allege the following regarding Plaintiff Toby Harmon's use of a plastic hand-held cone:

60. In 2016, the City's assistant district attorney reached an agreement with Plaintiff Harmon that would allow him to use his plastic hand-held cone in the future without additional threats of citation under the Code.

61. In October 2016, Defendant Robertson threatened Plaintiff Harmon with citation under the Code if he used his plastic hand-held cone.

62. In October 2016, multiple letters were sent to the City's assistant district attorney alerting him that the agreement they reached was not being honored.

63. In October 2016, the City's assistant district attorney unilaterally rescinded the agreement the City had previously reached with Plaintiff Harmon regarding the use of Plaintiff Harmon's plastic hand-held cone.

Plaintiffs' Verified Complaint at 8.

2. Defendants deny these allegations. Answer [Doc. Entry No. 27] at 9.

3. Plaintiffs submitted four (4) Interrogatories regarding the alleged agreement. Exhibit No. 1 - Defendant City of Norman's Responses to Plaintiffs' Combined First Set of Interrogatories and Request for Production of

Documents to Defendant City of Norman, Oklahoma at 10-11. The City denied the existence of an agreement regarding use of a hand-held plastic cone. *Id.*

4. Plaintiffs list “Interrogatory responses by City of Norman” as a trial exhibit. *Id.* at 6.

5. Plaintiffs have also requested the deposition of a corporate representative. Notice to Take Deposition [Doc. Entry No. 52]. The matters identified include the following:

6. The facts surrounding an agreement with Plaintiff Hannon in 2016 that would allow him to use his plastic hand-held cone in the future without additional citation under the City's Code Sec. 15-503, Disturbing the peace.
7. The facts surrounding who reviewed and/or responded to any of the letters that were sent, in 2016, to any City's employee(s) stating that the 2016 agreement reached regarding Plaintiff Hannon's use of a plastic hand-held cone was not being honored.

Subpoena to Testify at a Deposition in a Civil Action [Doc. Entry No. 52-1] at Exhibit “A” at 1-2.

8. The agreement regarding the hand-held plastic cone is alleged to have been made by Defendants’ lead counsel and the attorney who represented Plaintiff Harmon in *City v. Harmon*, Case No. MCN-2016-0620 (March 4, 2016), Andrea Worden. Exhibit No. 2 – Facebook Message from Toby Harmon at 1-2 (“I can’t tell you how infuriating it is for you to have agreed that I could use that plastic cone and to now go back on the promise. You, God, and Andrea

all know what you promised and what you did not promise. Not, either Andrea bold-face lied or you are currently doing that sir.”).

9. Plaintiffs do not list Ms. Worden as a witness. See Plaintiffs’ Witness List.

LEGAL STANDARD

While no rule prohibits a party from calling opposing counsel as a witness at trial, “[t]he practice of forcing trial counsel to testify as a witness ... has long been discouraged.” *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986). In *Shelton*, the Eighth Circuit ruled that a party is forbidden from deposing opposing counsel, except where the party seeking the deposition proves that “(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.” *Id.* (internal citation omitted). By logical extension, the *Shelton* rule also applies to determine whether an opposing counsel may be called as a witness at trial. The *Shelton* rule must apply with at least equal force at trial because, inter alia, many states’ rules of professional conduct require that, absent special circumstances, an attorney is disqualified from acting as trial counsel whenever she or he is a necessary witness. For example, Oklahoma Rule of Professional Conduct 3.7 requires as follows:

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

Therefore, good cause exists both to strike the opposing counsel from the witness list and to issue a protective order preventing the party from calling the opposing counsel to testify unless that party produces evidence to satisfy each of the three prongs of the *Shelton* rule. *See Wilson Rd. Dev. Corp. v. Fronabarger Concreters, Inc.*, 2015 WL 269795, slip op. at *1 (E.D. Mo. 2015).

DISCUSSION

Plaintiffs cannot meet their burden to show any of the factors set forth in *Shelton*. First, if Defendants' counsel is called to testify regarding the agreement claimed by Plaintiff Harmon, Defendants' counsel would state that there was no such agreement. Plaintiffs already have evidence regarding this proposed testimony – i.e., Interrogatory Responses by the City – and have requested the deposition of a corporate representative regarding the alleged agreement.

Second, the information sought from Defendants' lead counsel is not relevant. Plaintiffs have not cited and Defendants have not located any authority, legal or otherwise, which creates a constitutional right to use a plastic hand-held cone to preach into an abortion clinic. Or evidence which supports

a finding that the Defendants have treated similarly situated protestors differently.

Finally, the information sought from Defendants' lead counsel is not crucial to Plaintiffs' case. As noted above, Plaintiffs have not cited and Defendants have not found any authority, legal or otherwise that establishes a constitutional right to use a plastic hand-held cone to preach into an abortion clinic.

CONCLUSION

The information sought by Plaintiffs does not satisfy any of the conditions set forth in *Shelton*. Other means exist to obtain the information sought by Plaintiffs – i.e., Interrogatory responses by City of Norman and the deposition of a corporate representative. The information sought by Plaintiffs is not relevant to any of the claims alleged in this action – i.e., there is no constitutional right to use a plastic hand-held cone to preach into an abortion clinic. Finally, the information is not crucial to the preparation of Plaintiffs' case. Thus, this Court should issue an order striking Defendants' lead counsel from Plaintiffs' Witness List and a protective order against the deposition of Defendants' lead counsel.

WHEREFORE the above and foregoing, Defendants respectfully request that this Court enter an order striking Defendants' lead counsel from

Plaintiffs' Witness List and a protective order prohibiting Plaintiffs' from taking the deposition of Defendants' lead counsel.

Respectfully submitted,

CITY OF NORMAN, OKLAHOMA
KATHRYN WALKER, CITY ATTORNEY

by: s/ Rickey J. Knighton II
Rickey J. Knighton II, OBA No. 17257
Assistant City Attorney
Jeanne Snider, OBA NO. 19223
Assistant City Attorney
P.O. Box 370
201 West Gray
Norman, Oklahoma 73070
Telephone: (405) 217-7700
Facsimile: (405) 366-5425
Email: rick.knighton@normanok.gov
Email: jeanne.snider@normanok.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2021, I electronically transmitted the above and foregoing Answer to the Clerk of Court using the ECF System for filing to: David J. Markese, Frederick H. Nelson, and Brently C. Olsson.

s/ Rickey J. Knighton II

INDEX OF EXHIBITS

- | No. | Description |
|------------|---|
| 1. | Defendant City of Norman's Responses to Plaintiffs' Combined First Set of Interrogatories and Request for Production of Documents to Defendant City of Norman, Oklahoma |
| 2. | Facebook Message from Toby Harmon |