

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.* FRANK C. FOY  
AND SUZANNE B. FOY,

*Qui tam* Plaintiffs,

v.

No. 6:09-CV-178  
(Removed from Santa Fe District Court)  
(Case No. D-101-CV-2008-1895)

VANDERBILT CAPITAL ADVISORS, LLC, *et al.*,

Defendants.

**EXPEDITED MOTION FOR DEPOSITION OF PAULINE TURNER**

The plaintiff State of New Mexico, *ex rel.* Foy, respectfully moves the assigned judge or magistrate to enter an order to allow the deposition of Professor Pauline Turner to be taken on March 23, 2009, due to her declining health. *See* Affidavit of Pauline Turner, attached as Exhibit 1 to this motion. Under D.N.M.LR–Civ. 26.5(a) and the Court’s inherent authority, the assigned judge or magistrate may fashion discovery to meet special circumstances such as these. *See also* D.N.M.LR–Civ. 26.4(a) and Fed. R. Civ. P. 26(d)(1) which allow the Court to expedite discovery.

The grounds for this motion are sufficiently set forth in Professor Turner’s affidavit. Simply put, there is a significant possibility that she might die (or become incapacitated) before she can be deposed under the usual waiting period imposed by Rule 26. This is why the rules provide authority to expedite discovery when appropriate. (Undersigned counsel is not aware of any published federal decision which would allow a key witness to die during the Rule 26 waiting period.)

As shown by her affidavit, Professor Turner will be a key witness in this case, because she served as a Trustee of the New Mexico Educational Retirement Board (“ERB”) for 14

years. She has firsthand personal knowledge concerning many of the disputed issues in this case. *Inter alia*, Professor Turner was one of the ERB Trustees who voted against the investment in Vanderbilt, which caused the State of New Mexico to lose \$40 million. *See* Complaint ¶ 69.

This case has been removed to federal court by a few defendants, purportedly under the authority of 12 U.S.C. § 632. Whether this case has been properly removed is a question that will take some time to resolve, but in the meantime Professor Turner's testimony should not be lost.

12 U.S.C. § 632 contains an express instruction from Congress that these cases must be expedited. Section 632 cases must proceed to trial at least as fast as they would have in state court. In state court, the plaintiff State of New Mexico has the right to schedule Professor Turner's deposition at any time 30 days after service of the complaint, and no court order is required. Therefore, the plaintiff State of New Mexico should not be prejudiced and delayed by this removal, and § 632 explicitly so provides.

WHEREFORE, the plaintiff State of New Mexico respectfully moves the Court to enter an order allowing Professor Turner to be deposed starting on March 23, 2009, or earlier if a medical emergency presents itself.

Counsel for defendants have been notified by email today that plaintiff will seek to depose Professor Turner on March 23. Peter Simmons, Esq. has already responded that the Vanderbilt/Pioneer defendants are opposed to the taking of her deposition. A copy of this motion is being emailed to all defense counsel who have identified themselves to plaintiff's counsel. At this point it is not known which if any of the other defendants will oppose this motion.



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No. 6:09-CV-178

VANDERBILT CAPITAL ADVISORS, LLC; et al.,

Defendants.

STATE OF NEW MEXICO        )  
  ) ss.  
COUNTY OF BERNALILLO    )

**AFFIDAVIT OF PAULINE TURNER**

I, Pauline Turner, first being duly sworn, do state as follows:

1. My name is Pauline Turner. I live in Albuquerque, New Mexico.
2. I am a retired professor of Family Studies at the University of New Mexico.

I retired in 2004.

3. I served as a Trustee of the New Mexico Educational Retirement Board for approximately 14 years until the end of June 2008. I stepped down because of poor health, advancing age, and frustration in the direction that the Board was moving, particularly as it related to investment philosophy and the actions and characteristics of the Board Chair.

4. I have first-hand knowledge about what happened at ERB, including the investments with Vanderbilt and others.

6. I am 71 years old. My health is poor. In 2002 I was diagnosed with lung cancer. The treatment consisted of a lobectomy, which was the removal of the lower lobe of my right lung. I was also on oxygen for 24 hours a day, seven days a week.

7. I have also been diagnosed with COPD, which is Chronic Obstructive Pulmonary Disease. In recent months I have been hospitalized three times with acute respiratory distress which required the use of a ventilator. My doctors have said that I am now in end-stage COPD. My health is day-to-day.

8. I am willing to give sworn testimony. I believe I have a duty to testify if possible, especially because I was a fiduciary for the Educational Retirement Board and retired educators. I am concerned that disability or death might prevent me from testifying unless my deposition is taken as soon as possible.

9. I have agreed to have my deposition taken in Albuquerque starting on March 23 for a maximum of seven hours. Depending on my physical condition, the deposition might have to be broken up into shorter segments on March 23, 24 and/or 25. I understand that I will be asked questions by the lawyers for the plaintiffs and by the lawyers for the defendants.

10. I respectfully ask the Court to allow me to give sworn testimony starting on March 23.

**FURTHER AFFIANT SAYETH NOT.**

\_\_\_\_\_  
Pauline Turner

Subscribed and sworn to this \_\_\_\_\_ day of \_\_\_\_\_, 2009 by  
Pauline Turner.

\_\_\_\_\_  
Notary Public

My commission expires:

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