

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS**

**DIVISION OF SAINT THOMAS/ST. JOHN**

FLORA NICHOLAS and PAUL  
GAYTER in their own right and as next  
friend of S.G.,

Plaintiffs,

Civ. No. 2001/147 MR

v.

SUGAR BAY CLUB AND RESORT CORP.  
d/b/a WYNDHAM SUGAR BAY BEACH  
CLUB AND RESORT, CARIBBEAN HOTEL  
MANAGEMENT COMPANY and BRIAN  
HORNBY,

Defendants.

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**ORDER REGARDING PLAINTIFFS' MOTION FOR A PROTECTIVE ORDER**

THIS MATTER is before the Court on the plaintiff's Motion for a Protective Order.

Defendants filed opposition to the motion. Plaintiffs did not further reply.

Defendants seek to depose A.G., the nine-year old brother of the victim, S.G., in this matter. A.G. was a named plaintiff in the original complaint. However, he was removed as a party when the complaint was amended in October 2001. Plaintiffs claim that A.G. has been adversely affected by his sister's injury and should not be deposed.

Rule 26(c) grants judges the discretion to issue protective orders that impose restrictions on the extent and manner of discovery where necessary "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). The court, in its discretion, is authorized by this subsection to fashion a set of limitations that allows as much relevant material to be discovered as possible, while preventing unnecessary intrusions into the legitimate interests-- including privacy and other confidentiality interests--that

might be harmed by the disclosure of the material sought. *Pearson v. Miller*, 211 F.3d 57 (3d Cir. 2000). Courts "rarely grant a protective order which totally prohibits a deposition, unless extraordinary circumstances are present." *Spreadmark v. Federated Department Stores, Inc.*, 176 F.R.D. 116, 118 (S.D.N.Y. 1997); *Mike v. Dymon, Inc.*, 169 F.R.D. 376, 378 (D.Kan.1996); *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir.1979) (prohibition of deposition inappropriate absent extraordinary circumstances).

Such an order is only appropriate where the party seeking the order "show[s] good cause by demonstrating a particular need for protection." *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995). To make a showing of good cause, the party seeking confidentiality has the burden of showing the injury "with specificity." *Publiker Indus., Inc. v. Cohen*, 733 F.2d \*73 1059, 1071 (3d Cir.1984). The Court must balance the competing interests of allowing discovery and protecting parties and deponents from undue burdens. *Bucher v. Richardson Hospital Authority*, 160 F.R.D. 88, 92 (N.D. Tex. 1994).

Plaintiffs claim that since the incident A.G. has become "frightened and anxious"; has experienced nightmares and bed-wetting; and is afraid to sleep alone at night. They further claim that the deposition will be detrimental to A.G.'s emotional well-being, and that A.G. does not have any information which is relevant to the matter. Defendants counter that on every occasion alleged in the complaint, A.G. was present with the victim in the amphitheater and that he may also have relevant testimony regarding S.G.'s damages.

The Court finds that plaintiffs have a significant interest in protecting A.G. from the adverse effects of a deposition under the circumstances. At nine years of age he may be

impressionable and, it is entirely possible that a deposition may cause him distress. However, plaintiffs have not submitted any independent evidence of A.G.'s emotional and psychological state such as affidavits from medical doctors or psychologists. Plaintiffs' counsel's conclusory statements are insufficient to support an order barring the deposition completely. *Cf. Frideres v. Schiltz*, 150 F.R.D. 153 (S.D. Iowa 1993)(Protective Order granted based on testimony of medical doctors that witness' health would be jeopardized); *In re Tutu Wells Contamination CERCLA Litig.*, 189 F.R.D. 153 (D.V.I. 1999)(Protective Order granted prohibiting deposition of 83 year old witness who was gravely ill).

Additionally, an assertion that the proposed deponent lacks knowledge is not sufficient grounds for entry of a protective order. As a general rule, lack of personal knowledge is deemed insufficient to obtain a protective order. *Mellon Bank, N.A. v. Bank of New Jersey*, 1992 WL 80800 \*1 (E.D.Pa. Apr. 14, 1992); *Ierardi v. Lorillard*, 1991 WL 158911 \*1 (E.D.Pa. Aug. 13, 1991); *Horsewood v. Toys "R" Us*, 1998 WL 526589\*3 (D.Kan. Aug. 13, 1998). A party seeking discovery may test a witness' asserted lack of knowledge. *See Naftchi*, 172 F.R.D. at 132 (citing 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2037 (2d ed.1994)).

Defendants have made a sufficient showing that A.G. might have pertinent information regarding the claims since he was present at all times when his sister was allegedly molested. Defendants also argue that A.G. may have information regarding plaintiffs' claims of adverse effects on the family since the incidents. In the absence of credible medical evidence that A.G. will be irreparably harmed by the deposition, this Court finds that there are conditions which may be imposed which would protect A.G. and honor the defendants' right to discovery.

*Bucher*, 160 F.R.D. at 94-95.

Now, therefore, it is hereby ORDERED AS FOLLOWS:

1. The motion for protective order is DENIED.
2. The deposition may occur in the witness' home or some other venue agreed upon by the parties;
3. No more than two (2) attorneys (for all defendants) may be present;
4. One parent and an individual trained in psychology may be present;
5. The subject matter of this deposition shall be limited to exploring A.G.'s knowledge of facts concerning liability and damages as noted in defendants' opposition to this motion. Counsel shall refrain from tactics calculated to confuse, annoy, harass, or imply doubt regarding the veracity of the witness;<sup>1</sup>
6. The deposition will be limited to two hours of direct examination to be shared by counsel for defendants and does not include any time consumed by objections, attorney dialogue, breaks or other interruptions. Counsel for plaintiff may cross-examine the witness for a period of time not to exceed one hour. Defendants may then conduct re-direct examination for a time period not to exceed the length of cross-examination;
7. All objections to testimony shall be made outside of the hearing of deponent, A.G.;

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<sup>1</sup>The intention of this Order is to allow the deposition to proceed in a minimally intrusive manner. All parties are expected to fully respect the spirit thereof.

8. A violation of this order may result in sanctions under Rule 37(b)(2) of the Federal Rules of Civil Procedure.

Dated: May 24, 2002

ENTER:

\_\_\_\_\_/s/\_\_\_\_\_  
JEFFREY L. RESNICK  
U.S. MAGISTRATE JUDGE

A T T E S T:  
Wilfredo F. Morales, Clerk of Court  
by: \_\_\_\_\_  
Deputy Clerk

cc: Daryl C. Barnes, Esq.  
Douglas Beach, Esq.  
John Zebedee, Esq.