IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SHAHEED TAALIB'DIN MADYUN, ORDER

Petitioner, 08-cv-32-bbc

v.

KIRBY LINJER,

Respondents.

Plaintiff Shaheed Madyun is proceeding on a claim that defendant Kirby Linjer violated his Eighth Amendment rights by leaving him in his cell for several hours on October 23, 2001, after a prisoner in a nearby cell started a fire, causing plaintiff to choke and cough up blood as a result of smoke inhalation. Trial is scheduled for October 22, 2008.

Defendant has filed a motion to present the testimony of Michael Finger through video deposition at trial pursuant to Fed. R. Civ. P. 32. Finger was the emergency room physician who treated plaintiff when he was taken to the hospital later on October 23. Defendant believes that Finger will provide relevant testimony, but defendant does not wish to subpoena the witness because "[r]equiring Dr. Finger to appear in person would be extremely inconvenient for him and would jeopardize patient care." Dkt. #90, at 2. Defendant plans to depose Finger on October 10 and says that "[a]rrangements will be made for Madyun to appear by telephone." *Id.*

Defendant does not identify which provision of Rule 32 authorizes the use of Finger's

proposed deposition testimony at trial, so I assume he means to rely on the catchall provision, Rule 32(a)(4)(E), which applies when "exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used." Even if I assume that defendant has met this standard, he has a problem under Rule 32(a)(1)(A), which prohibits the use of a deposition at trial unless the opposing party had an opportunity to be "present" at the deposition. Defendant admits that it plans to allow plaintiff to appear by telephone only.

Defendant does not acknowledge Rule 32(a)(1)(A), much less develop an argument under it, but I presume defendant's position would be that an appearance by telephone is enough to satisfy the rule's presence requirement. That reading would be inconsistent with the purpose of the rule, which is to provide a substitute for trial testimony when a witness is unable to appear at trial. Of course, at trial, plaintiff would be able to confront any witness in person and see for himself how the witness responded to particular questions. Courts have long recognized in various contexts that a witness's demeanor is one of the most important ways to evaluate the testimony of that witness. *E.g., Toliver v. McCaughtry*, 539 F.3d 766, 775 (7th Cir. 2008); *United States ex rel. Little v. Twomey*, 477 F.2d 767, 771 (7th Cir. 1973).

Accordingly, I conclude that defendant may not introduce any deposition at trial unless plaintiff is physically present during the deposition. This means that defendant has three choices: bring Dr. Finger to trial, bring the deposition to the prison or forego using the doctor as a witness. Any other outcome would not give plaintiff an adequate opportunity for cross

examination.

ORDER

Defendant Kirby Linjer's motion to present Michael Finger's testimony through video deposition is DENIED without prejudice to his refiling it after he has deposed Finger in the presence of Shaheed Madyun.

Entered this 7th day of October, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge