

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

Susan Doxtator, Arlie Doxtator and
Sarah Wunderlich, as Special
Administrators of the Estate of
Jonathon C. Tubby,

Plaintiffs,

Case No. 19-CV-137

vs.

Erik O'Brien, Andrew Smith,
Todd J. Delain, Heidi Michel,
City of Green Bay, Brown County,
Joseph P. Mleziva, Nathan K.
Winisterfer, Thomas Zeigle,
Bradley A. Dernbach and John Does 1-5,

Defendants.

**DEFENDANTS ERIK O'BRIEN, ANDREW SMITH AND CITY OF GREEN BAY'S
RESPONSE TO PLAINTIFFS' MOTION TO COMPEL AND FOR SANCTIONS**

Defendants Erik O'Brien, Andrew Smith and City of Green Bay (collectively "City Defendants"), by their attorneys, Gunta Law Offices, S.C., respond to Plaintiffs' Susan Doxtator, Arlie Doxtator and Sarah Wunderlich (Plaintiffs) Motion to Compel and for Sanctions (Dkt. 71) as follows:

PREFACE

This case involves the October 19, 2018, officer-involved shooting death of Jonathan Tubby in the sally port of the Brown County Jail. On January 24, 2019 Plaintiffs filed a Complaint as special administrators of the Estate of Mr. Tubby against the City of Green Bay, and named as

Defendants several employees of the Green Bay Police Department, Brown County, and several Brown County Sheriffs Department employees. See Dkt. 1. On March 5, 2019 Plaintiffs filed an Amended Complaint removing one of the City Defendants and adding multiple Brown County Defendants. See Dkt. 22. On August 29, 2019, Plaintiffs filed a Second Amended Complaint. (Dkt. 66) Green Bay Police Officer Scott Salzmann was not named as a Defendant in any of Plaintiffs' three Complaints. Id.

Officer Salzmann was on scene during the October 19, 2018 shooting incident, was an assigned K9 handler and was an eye-witness to the shooting. Plaintiffs' counsel deposed Officer Salzmann on December 20, 2019 for approximately three and a half hours. (Dkt. 74-2, p. 2) During the deposition, Plaintiff's counsel solicited testimony from Officer Salzmann about the significance of his tattoos. Officer Salzmann was not instructed by counsel for the City Defendants to not respond, and did respond with the following:

A: These tattoos, I'm very patriotic and they have personal symbolic reason or meaning to me, and that's all I'm going to tell you on that.

Q: All right. I don't want to pry into your personal life, but I just want to -- does it mean you killed someone?

A: These tattoos have symbolic meaning to me that mean something personal, and that's all I can testify to.

Q: So you can't say whether or not it means that you killed someone?

A: I can. I won't.

Q: Okay. You refuse to answer the question?

A: I'm answering that these tattoos have symbolic meaning to me that's personal in nature, and that's what I will tell you.

Q: I'm not trying to pry into your personal life at all. I just want to

know whether or not it means you killed someone.

A: But you are.

Q: Okay. But can you at least tell me whether or not it means you killed someone?

A: These tattoos have some personal and symbolic meaning to me, and that's what they're at.

Q: And you refuse to say anything beyond that?

A: I'm not going to tell you any more than that.

(Salzmann Depo. pp. 141:1-25)

Plaintiffs' motion seeks to compel additional deposition testimony of Officer Salzmann, a non-party witness, to answer questions about his tattoos. See generally Dkt. 72, pp. 7-9. Plaintiffs' counsel is not seeking to discover information relevant to the material facts in this case, but rather is seeking irrelevant information that appears intended only to harass a non-party witness. Accordingly, the City Defendants respectfully request that the Court deny Plaintiffs' motion.

DISCUSSION

I. Officer Salzmann is Not a Party to this Action and His Testimony Regarding the Meaning Behind his Tattoos is Completely Irrelevant.

Rule 37 states that if a party fails to answer a question in a deposition, the discovering party may move to compel an answer. Fed. R. Civ. P. 37(a)(3)(B)(i). Officer Salzmann is a non-party. Non-party status is a significant factor to be considered in determining whether the burden imposed by a subpoena is undue. United States v. Amerigroup Ill., Inc., 2005 WL 3111972 at *4 (N.D.Ill. 2005) (citations omitted). It is clear that information in the hands of a non-party is subject to discovery under the Federal Rules. See Fed.R.Civ.P. 26(b)(1); Fed.R.Civ.P. 45; Seattle Times Co.

v. Rhinehart, 467 U.S. 20, 25 (1984). But that does not mean non-parties must yield to discovery requests that cause undue burdens, as evidenced by the protections in the Federal Rules. See Fed.R.Civ.P. 26(b), (c); Fed.R.Civ.P. 45(d).

Plaintiffs' reliance on Colon v. Town of Cicero, is misguided. See Dkt. 72, pp. 8-9, citing as illustrative Colon, No. 12 CV 5481, 2015 WL 4625003 (N.D. Ill. Aug. 3, 2015)). In Colon, the district court granted Plaintiff's motion to compel additional deposition testimony from Defendant Garrity, a police officer for the City of Cicero, who refused to answer a number of questions during his prior deposition. Colon, 2015 WL 4625003, at *1. Specifically, Defendant Garrity asserted that he should not be required to answer questions about his untruthfulness on his application for employment with the police department, his pre-employment psychological testing or his military activities because the questions implicate his Fifth Amendment privilege against self-incrimination. Id. at * 2. The District Court rejected Defendant Garrity's Fifth Amendment claim reasoning that the privilege did not apply because an answer about lying on an application for employment with a police officer would have some tendency to subject him or her to criminal liability. Id. at * 2-3

Unlike the Defendant Garrity in Colon, Officer Salzmann is only a witness to the shooting incident and not a named Defendant. Therefore he cannot be compelled to provide additional testimony.

Furthermore, the testimony sought to be compelled relates to the meaning of Officer Salzmann's tattoos, and is irrelevant to the issues in this case. A motion to compel seeking additional discovery under Rule 37 may be denied if the discovery sought is irrelevant. To begin, any discovery sought under Fed. R. Civ. P. 26(b) must be relevant, and its relevance must outweigh the burden of producing the evidence. See also Fed. R. Evid. 403 (relevance should outweigh the unfair prejudicial effect).

Plaintiffs attempt to connect the relevancy of Officer Salzmann's tattoo to municipal liability claims against the City of Green Bay by speculating as to the meaning of the tattoos. See Dkt. 72, pp. 8-9. In doing so, Plaintiffs absurdly suggest that Officer Salzmann's tattoos demonstrate that he is "celebrating" his involvement in police-involved shootings. Id. at p. 8. This suggestion is completely baseless and contrary to the testimony that Officer Salzmann provided about his tattoos. (Salzmann Depo. pp. 141:1-25) Officer Salzmann testified that he is very patriotic and that his tattoos have a personal symbolic reason or meaning to him. Id.

Even if Plaintiffs' suggestion that Officer Salzmann has tattoos celebrating his participation in officer-involved shootings was true, that is still completely irrelevant to the issue of whether or not the City of Green Bay has a policy of excessive force and whether the City of Green Bay adequately supervises its police officers, allegations which are the basis for Plaintiffs' claims against the City. Officer Salzmann is not an official policy maker, and his tattoos cannot be used to suggest that the City, either expressly or implied, created or condoned, a policy that permitted the use of excessive force.

Plaintiffs' have not suggested that Officer Salzmann's use of force in this case, or any other case, were not justified. Nor have Plaintiffs have alleged or even identified a City policy relating to a police officer's tattoo. Plaintiffs are simply seeking testimony in an apparent effort to harass a non-party witness.

In short, there is no marginal relevance in additional testimony about Officer Salzmann's tattoos.

II. Sanctions Against Officer Salzmann or the City of Green Bay are Not Warranted.

Courts have broad discretion to impose sanctions. This power derives from the court's inherent power to manage its own affairs and to achieve the orderly and expeditious disposition of cases. Flury v. Daimler Chrysler Corp. 427 F.3d 939, 944 (2005); see also Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991). Accordingly, sanctions for discovery abuses are intended to prevent unfair prejudice to litigants and to insure the integrity of the discovery process.

In the instant motion, Plaintiffs seek sanctions from the City Defendants for the cost of compelling irrelevant testimony from a non-party witness. As discussed above, the information sought is not necessary to the issues in this case, therefore sanctions for Officer Salzmann's failure to provide more detailed responses are not warranted. Additionally, there is no evidence that the City Defendants are responsible in any way for Officer Salzmann's independent decision to refuse to answer questions about his tattoos. The City Defendants must not be punished for actions which they bear no responsibility.

CONCLUSION

Based on the foregoing, the City Defendants respectfully request that Plaintiffs' Motion to Compel(Dkt. 71) be denied.

Dated at Wauwatosa, Wisconsin, this 4th day of February, 2020.

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