

**IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

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

Plaintiffs,

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,
and John Does 1-5,

Defendants.

Case No. 1:19-cv-00137-WCG

**DECLARATION OF FORREST
TAHDOOAHNIPPAAH IN SUPPORT
OF PLAINTIFFS' MOTION TO
COMPEL AND FOR SANCTIONS**

I, Forrest Tahdooahnippah, state and declare as follows:

1. I am an attorney licensed to practice law in this District. I am a Partner in the law firm of Dorsey & Whitney LLP, and am one of the attorneys representing Plaintiffs in the above-captioned action. I submit this Declaration in support of Plaintiffs' Motion to Compel and For Sanctions. I have personal knowledge of the matters set forth in this Declaration, and if called to testify in this case I would and could competently testify as to such matters.

2. On February 21, 2020, I served on Defendants a Notice of Rule 30(b)(6) Deposition of Brown County in connection with the above-captioned case. Attached hereto as **Exhibit A** is a true and correct copy of the Notice of Rule 30(b)(6) Deposition

of Brown County, served upon Defendants, including Brown County, on February 21, 2020. I also inquired about scheduling the deposition.

3. On May 1, 2020, I followed up with Brown County about scheduling its Rule 30(b)(6) deposition, and followed up again on May 15, 2020.

4. On June 2, 2020, Brown County finally provided potential dates for its Rule 30(b)(6) deposition, but stated that it would not be producing any witness to testify regarding Topics 1 and 2.

5. By email correspondence on June 10, 2020, Brown County claimed that it would not produce a witness for Topics 1 and 2 because the person that they would call to testify to Topics 1 and 2—Lt. Thomas Zeigle—has already been deposed by Plaintiffs' counsel in his individual capacity. A true and correct copy of this email chain is attached hereto as **Exhibit B**.

6. Prior to filing the Motion to Compel and For Sanctions, I attempted in good faith to obtain a designated Rule 30(b)(6) deponent to testify to Topics 1 and 2 at Brown County's deposition through several emails. The Brown County Defendants refused to designate a deponent to testify to Topics 1 and 2 at Brown County's Rule 30(b)(6) deposition.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on June 17, 2020 in Minneapolis, Minnesota.

/s/ Forrest Tahdooahnippah
Forrest Tahdooahnippah

EXHIBIT A

**IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

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

Plaintiffs,

Case No. 1:19-cv-00137-WCG

**NOTICE OF RULE 30(B)(6)
DEPOSITION OF BROWN COUNTY**

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.

PLEASE TAKE NOTICE that, pursuant to Fed. R. Civ. P. 30(b)(6), Plaintiffs will take the depositions of the Brown County, regarding the topics set forth in Exhibit A, at a place and time to be determined. The deposition will be taken by oral examination before a qualified court reporter or other person authorized to administer oaths, will be recorded by stenographic means, and will continue by adjournment until completed.

Pursuant to Rule 30(b)(6), Brown County shall designate and produce for deposition one or more of its employees, officers, directors, agents, or other persons duly authorized to testify on their behalf regarding the topics set forth in Exhibit A. To the extent Brown County designates a witness who has personal knowledge of facts related

to this action, Plaintiffs reserve, maintain, and in no way waive their right to notice the deposition of that witness in the future regarding his or her personal knowledge in this matter. Furthermore, Plaintiffs reserve, maintain, and in no way waive their right to notice Brown County for Rule 30(b)(6) depositions regarding matters not set forth in Exhibit A.

EXHIBIT A

DEFINITIONS AND INSTRUCTIONS

1. As used herein, “You,” “your,” or “Brown County” refers to the government of the Brown County, Wisconsin, including its past and present employees, officers, directors, attorneys, representatives, agents, consultants, divisions, successors, assignees, and any other persons acting, or purporting to act, on its behalf for any purpose.

2. As used herein, “document” shall have the same broad meaning as in Rule 34(a)(1) of the Federal Rules of Civil Procedure, and includes any written or graphic matter or any medium of any type or description upon which intelligence or information is recorded or from which intelligence or information can be recorded, which is or has been in the possession, custody, or control of Intrepid, or of which Intrepid has knowledge, including the original and any non-identical copy (whether different from the original because of notes made on said copy or otherwise) of any advertising literature; agreement; bank record or statement; bid; blueprint; book; book of account; booklet; brochure; calendar; chart; check; circular; coding form; communication (intra- or inter-company); computer printout; computer-readable form; contract; copy; correspondence; data base; diary; display; draft of any document; drawing; electronic mail or “e-mail”; film; film transparency; flyer; forecast; graph; index; instruction; instruction manual or sheet; invoice; job requisition; letter; license; magnetic media of all kinds (including disks, tapes, or other media) containing computer software with supporting indices, data, documentation, flow charts, comments, object code, source code, and computer programs

relating thereto; manual; map; memoranda; minute; newspaper or other clipping; note; notebook; opinion; pamphlet; paper; periodical or other publication; photograph; price list; print; printed circuit board; promotional literature; receipt; record; recorded Read-Only-Memory (ROM); recording; report; solicitation; statement; statistical compilation; stenographic notes; study; summary (including any memoranda, minutes, notes, records, or summary of any (a) telephone, intercom, or voicemail conversation or message, (b) personal conversation or interview, or (c) meeting or conference); telegram; telephone log; travel or expense records; video recording; video tape; voice recording; voucher; worksheet or working paper; writing or other handwritten, printed, reproduced, recorded, typewritten, or otherwise produced graphic material from which the information required may be obtained, or any other documentary material of any nature.

3. In interpreting these topics, the following additional definitions/guidelines shall apply:

- a. the singular of each word shall be construed to include its plural and vice versa;
- b. “and” and “or” shall be interpreted in either the conjunctive or disjunctive sense to bring within the scope of the request the broadest number of documents and greatest amount of information;
- c. “each” shall be construed to include “every” and vice versa;
- d. “include” and “including” shall mean including without limitation;
- e. “any” shall be construed to include “all” and vice versa; and
- f. the present tense shall be construed to include the past tense and vice versa.

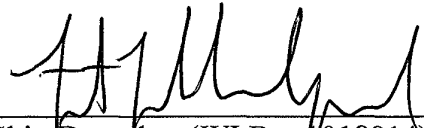
TOPICS

Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, Brown County shall designate and produce for deposition one or more officers, directors, managing agents, employees or other sufficiently knowledgeable persons to testify on the County's behalf regarding the following topics:

1. Your efforts, or the efforts of your officers, to determine whether Tubby was armed after his arrest on October 19, 2018, including any efforts to contact family members including but not limited to Theresa Rodriguez.
2. The existence of any exigencies on the night of October 19, 2018 requiring the removal of Tubby from Officer Wernecke's squad car.
3. Your policies, practices, customs, and training regarding encounters with suspects that resist custody within "sally port" areas of jails.
4. Your policies, practices, customs, and training regarding interaction with suicidal subjects or arrestees, including barricaded suicidal subjects.
5. Your policies, practices, customs, and training regarding the use of deadly force, including but not limited to (i) use of deadly force when less lethal or non-lethal options are available and (ii) the use deadly force when there is a risk of "cross fire."
6. Your policies, practices, customs, and training regarding the deployment of crisis negotiation teams.
7. Your policies, practices, customs, and training regarding the deployment of a SWAT team when dealing with an armed subject or armed barricaded subject.

8. The resources available to SWAT teams, training regarding use of those resources, and chain of command when deployed.
9. Jurisdiction over the Brown County jail sally port area, jurisdiction over the use of BearCat, and your policies, practices, customs, and training concerning any interagency duty to intervene.
10. Your policies, practices, customs, and training regarding the duty to intervene to prevent excessive force.
11. Your policies, practices, customs, and training regarding the use of OC spray in confined spaces, such as a vehicle.
12. Your document collection and preservation efforts in this case.
13. Number of prior instances of use of force, including but not limited to use of OC spray, bean bag guns, Tasers, firearms, and/or deadly force, in sally port area of the Brown County jail.

Dated: February 21, 2020

By 
Skip Durocher (WI Bar 1018814)
durocher.skip@dorsey.com
Forrest Tahdooahnippah (MN Bar
0391459)
forrest@dorsey.com

DORSEY & WHITNEY LLP
Suite 1500, 50 South Sixth Street
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600
Facsimile: (612) 340-2868

David R. Armstrong (WI Bar 1070205)
david.armstrong4@gmail.com
8975 Westchester Dr.
Manassas, VA 20112

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of February, 2020, I caused to be served the foregoing PLAINTIFFS' NOTICE OF RULE 30(B)(6) DEPOSITION OF BROWN COUNTY via email on the following attorneys/parties:

GUNTA LAW OFFICES SC
Ann C. Wirth
acw@guntalaw.com
Gregg J. Gunta
gjjg@guntalaw.com
Jasmyne M. Baynard
Jmb@guntalaw.com
John A. Wolfgang
jaw@guntalaw.com
9898 W. Bluemound Rd.
Suite 2
Wauwatosa, WI 53226

Attorneys for Green Bay Defendants

CRIVELLO CARLSON SC
Benjamin A. Sparks
bsparks@crivellocarlson.com
Samuel C. Hall, Jr.
SHall@CrivelloCarlson.com
Jose Antonio Castro
jcastro@crivellocarlson.com
The Empire Building
710 N. Plankinton Ave
Suite 500
Milwaukee, WI 53203

Attorneys for Brown County Defendants

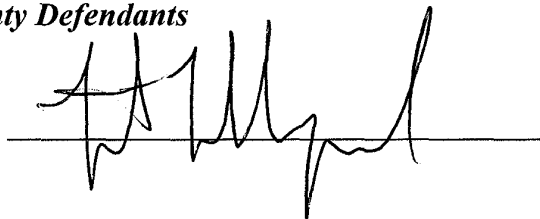
A handwritten signature in black ink, appearing to be "H. J. Hall", is written over a horizontal line. The signature is stylized with a large initial "H" and a long, sweeping tail.

EXHIBIT B

From: [Sparks, Ben A.](#)
To: [Tahdoahnippah, Forrest](#)
Cc: [Hall, Samuel C.](#)
Subject: RE: [EXTERNAL] RE: Doxtator et al v. O'Brien et al Discovery
Date: Wednesday, June 10, 2020 10:05:36 AM
Attachments: [image002.png](#)

Hi Forrest,

While I still don't believe that the first two topics in your 30(b)(6) notice are appropriate for that type of a deposition, we've gone back to our clients to determine whether someone has knowledge of those topics on behalf of the County. Just as a refresher, the first two topics are: (1) the County's "efforts, or the efforts of [its] officers, to determine whether Tubby was armed after his arrest on October 19, 2018, including any efforts to contact family members including but not limited to Theresa Rodriguez"; and (2) "[t]he existence of any exigencies on the night of October 19, 2018 requiring the removal of Tubby from Officer Wernecke's squad car."

Because these topics relate to the real-time events that evolved during the October 19, 2018 incident, the County's knowledge (if any) on these topics would flow through those present on scene at the time. To that end, if any County representative has knowledge of topic numbers 1 and 2, it would be Lt. Zeigle, as he was the highest ranking law enforcement officer with the Brown County Sheriff's Office on scene at the time of the incident. You previously deposed Lt. Zeigle for close to 5 hours on January 10, 2020. At the time of his deposition, the operative complaint named Lt. Zeigle as a defendant in both his individual and official capacities, and there were specific allegations that Lt. Zeigle was a "policy-making official" and "had final authority" on scene. See (ECF No. 66 ¶ 72.) In his deposition, Lt. Zeigle was asked several questions about how the bases of his belief that Tubby was armed. See (Zeigle Dep. at 15-16, 18-19, 78, 86.) He was also asked several questions about the existence of any "exigencies" on the night of the incident. See (Zeigle Dep. at 126-27, 131-34.)

In short, even assuming that topics 1 and 2 are appropriate 30(b)(6) topics, the plaintiffs have already deposed the County representative best situated to speak about the County's knowledge or lack of knowledge on those topics. The questions to Lt. Zeigle in his deposition and the allegations that he was acting as a final a policy-maker on behalf of the County at the scene show that the plaintiffs were capable of asking Lt. Zeigle any questions relating to his (and the County's) knowledge of topics 1 and 2 at the time of his January 10, 2020 deposition. As I said in my prior e-mail, we'll be producing Lt. Michael Jansen on June 24 to testify about the 11 other topics listed in your Rule 30(b)(6) notice, but you'll need to bring a motion under Fed. R. Civ. P. 30(a)(2)(A)(ii) if you intend to depose Lt. Zeigle again, as we believe that there is not good cause for a second deposition because it would be unreasonably cumulative and duplicative, and the information sought could be obtained through less expensive and burdensome means, such as written discovery. If you have any questions or want to discuss further, please feel free to give me a call.

Thanks much,

Ben



**CRIVELLO
CARLSON S.C.**

ATTORNEYS

Benjamin A. Sparks | Shareholder

(414) 271-7722

Main

(414) 615-8411

Direct

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From: Sparks, Ben A.

Sent: Tuesday, June 9, 2020 1:04 PM

To: 'forrest@dorsey.com' <forrest@dorsey.com>

Subject: RE: [EXTERNAL] RE: Doxtator et al v. O'Brien et al Discovery

Hi Forrest,

That date works. I'll be able to get back to you tomorrow morning re: the first two topics.

Thanks,

Ben



**CRIVELLO
CARLSON S.C.**

ATTORNEYS

Benjamin A. Sparks | Shareholder

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From: forrest@dorsey.com <forrest@dorsey.com>

Sent: Tuesday, June 9, 2020 12:52 PM

To: Sparks, Ben A. <BSparks@CrivelloCarlson.com>; jmb@guntalaw.com; Brent, Linda <LBrent@CrivelloCarlson.com>; acw@guntalaw.com; jaw@guntalaw.com; gig@guntalaw.com; Hall, Samuel C. <SHall@CrivelloCarlson.com>; Castro, Jose A. <JCastro@CrivelloCarlson.com>
Cc: durocher.skip@dorsey.com; david.armstrong4@gmail.com
Subject: RE: [EXTERNAL] RE: Doxtator et al v. O'Brien et al Discovery

For the County's Rule 30(b)(6), let's do June 24. I will work on an amended notice. Let me know if you will be producing a witness for the two topics that were the subject of other emails, or whether Plaintiffs need to file a motion on that.

From: Sparks, Ben A. <BSparks@CrivelloCarlson.com>
Sent: Tuesday, June 2, 2020 11:04 AM
To: Tahdooahnippah, Forrest <forrest@dorsey.com>; jmb@guntalaw.com; Brent, Linda <LBrent@CrivelloCarlson.com>; acw@guntalaw.com; jaw@guntalaw.com; gig@guntalaw.com; Hall, Samuel C. <SHall@CrivelloCarlson.com>; Castro, Jose A. <JCastro@CrivelloCarlson.com>
Cc: Durocher, Skip <durocher.skip@dorsey.com>; david.armstrong4@gmail.com
Subject: RE: [EXTERNAL] RE: Doxtator et al v. O'Brien et al Discovery

Hi Forrest,

You're correct that you previously provided dates for Noble's deposition—I think I dropped the ball on following up on those. Would 6/22, 6/25, or 6/26 work for everyone? Given that Noble is out in California, I believe our plan would be to conduct that one remotely.

All of the proposed dates for the depositions of Nina Kay Hellendrung, Ronny John, and Theresa Rodriguez work for me.

Also, let us know as soon as you can about the depositions for Wednesday and Thursday. Completely understandable reason for needing to postpone—I just want to be able to let our officers know as soon as I can so that they can adjust their work schedules, etc.

Lastly, I'll need to double check on this, but here are potential dates for the County's Rule 30(b)(6) deposition: 6/16, 6/17, 6/22, 6/24, 6/25, and 6/26. Lieutenant Mike Jansen will be testifying on behalf of the County. He will be able to speak to all topics listed in the notice except for the first two. Those topics appear to relate to the County's knowledge/actions at the scene. Because the County is an entity and not a living person who was present on scene, the information sought in the first two topics would need to come from the officers who were present or involved at the time of the incident.

Thanks much,

Ben



**CRIVELLO
CARLSON S.C.**

ATTORNEYS

Benjamin A. Sparks | Shareholder

(414) 271-7722

Main

(414) 615-8411

Direct

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From: forrest@dorsey.com <forrest@dorsey.com>

Sent: Monday, June 1, 2020 1:42 PM

To: jmb@guntalaw.com; Brent, Linda <LBrent@CrivelloCarlson.com>; Sparks, Ben A. <BSparks@CrivelloCarlson.com>; acw@guntalaw.com; jaw@guntalaw.com; gig@guntalaw.com; Hall, Samuel C. <SHall@CrivelloCarlson.com>; Castro, Jose A. <JCastro@CrivelloCarlson.com>

Cc: durocher.skip@dorsey.com; david.armstrong4@gmail.com

Subject: RE: [EXTERNAL] RE: Doxtator et al v. O'Brien et al Discovery

I also believe dates were provided, but nothing set in stone. When you all have a date, let me know and I will make sure Jeff has it on his calendar.

I also want to alert you all to a possibility that the Smith and Mleziva depositions may have to be rescheduled, for which I apologize. Ordinarily, I would never spring this one on you a few days away, but I am sure that you all are aware of the demonstrations, protests, riots, and civil unrest that is occurring in Minneapolis right now.

My office was scheduled to reopen today as COVID19 restrictions are loosened. However, I just heard that today the office is closing at 3pm due to potential demonstrations in downtown Minneapolis. If something similar were to happen on Wednesday or Thursday, I would be unable to proceed with the deposition. They are making these calls on a day-by-day basis. Thanks for your understanding.

From: Jasmyne Baynard <jmb@guntalaw.com>

Sent: Monday, June 1, 2020 1:23 PM

To: Tahdooahnippah, Forrest <forrest@dorsey.com>; LBrent@CrivelloCarlson.com; BSparks@CrivelloCarlson.com; Ann Wirth <acw@guntalaw.com>; John Wolfgang <jaw@guntalaw.com>; Gregg Gunta <gig@guntalaw.com>; SHall@CrivelloCarlson.com; JCastro@CrivelloCarlson.com

Cc: Durocher, Skip <durocher.skip@dorsey.com>; david.armstrong4@gmail.com

Subject: RE: [EXTERNAL] RE: Doxtator et al v. O'Brien et al Discovery

Just following up on the timing of the Nobel deposition. Ben, were you going to Notice that? I know we provided dates, but wasn't sure if anything was set in stone, if not we would like to get that scheduled this month.

Thanks

Jasmyne M. Baynard, Esq.

Attorney at Law

GUNTA LAW OFFICES, S.C.

9898 West Bluemound Road, Suite 2

Wauwatosa, WI 53226

P: (414) 291-7979

F: (414) 291-7960

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From: forrest@dorsey.com <forrest@dorsey.com>

Sent: Tuesday, May 19, 2020 9:55 AM

To: Jasmyne Baynard <jmb@guntalaw.com>; LBrent@CrivelloCarlson.com;
BSparks@CrivelloCarlson.com; Ann Wirth <acw@guntalaw.com>; John Wolfgang
<jaw@guntalaw.com>; Gregg Gunta <gig@guntalaw.com>; SHall@CrivelloCarlson.com;
JCastro@CrivelloCarlson.com

Cc: durocher.skip@dorsey.com; david.armstrong4@gmail.com

Subject: RE: [EXTERNAL] RE: Doxtator et al v. O'Brien et al Discovery

Yes, I am planning on all depositions being remote from here on out until we discuss otherwise.

Sent from my Verizon, Samsung Galaxy smartphone

----- Original message -----

From: Jasmyne Baynard <jmb@guntalaw.com>

Date: 5/19/20 9:43 AM (GMT-06:00)

To: "Tahdooahnippah, Forrest" <forrest@dorsey.com>; LBrent@CrivelloCarlson.com,
BSparks@CrivelloCarlson.com, Ann Wirth <acw@guntalaw.com>, John Wolfgang
<jaw@guntalaw.com>, Gregg Gunta <gig@guntalaw.com>, SHall@CrivelloCarlson.com,
JCastro@CrivelloCarlson.com

Cc: "Durocher, Skip" <durocher.skip@dorsey.com>, david.armstrong4@gmail.com
Subject: RE: [EXTERNAL] RE: Doxtator et al v. O'Brien et al Discovery

Just to confirm, are you planning on taking the Depositions of Smith / Winisterfer / Mleziva / Rose and Katers remotely?

Also, we are available for Nobel Deposition, we are unavailable 3-4 & 9 if the County Depos are occurring and also the 16-17. The week of the 22-26 is also open.

Thanks

Jasmyne M. Baynard, Esq.

Attorney at Law

GUNTA LAW OFFICES, S.C.

9898 West Bluemound Road, Suite 2

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P: (414) 291-7979

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From: forrest@dorsey.com <forrest@dorsey.com>

Sent: Monday, May 18, 2020 11:44 AM

To: LBrent@CrivelloCarlson.com; Jasmyne Baynard <jmb@guntalaw.com>; BSparks@CrivelloCarlson.com; Ann Wirth <acw@guntalaw.com>; John Wolfgang <jaw@guntalaw.com>; Gregg Gunta <gig@guntalaw.com>; SHall@CrivelloCarlson.com; JCastro@CrivelloCarlson.com

Cc: durocher.skip@dorsey.com; david.armstrong4@gmail.com

Subject: RE: [EXTERNAL] RE: Doxtator et al v. O'Brien et al Discovery

Let's do: Smith on afternoon of June 3, Winisterfer and Mleziva on June 4, and Rose and Katers on June 9. I will circulate deposition notices shortly.

I was also asked about Jeff Noble's deposition dates, we are available June 4-19, but I cannot due June 4 and 9 if we have other those dates of course.

From: Brent, Linda <LBrent@CrivelloCarlson.com>

Sent: Friday, May 15, 2020 10:00 AM

To: Tahdooahnippah, Forrest <forrest@dorsey.com>; jmb@guntalaw.com; Sparks, Ben A. <BSparks@CrivelloCarlson.com>; acw@guntalaw.com; jaw@guntalaw.com; gig@guntalaw.com;

Hall, Samuel C. <SHall@CrivelloCarlson.com>; Castro, Jose A. <JCastro@CrivelloCarlson.com>

Cc: Durocher, Skip <durocher.skip@dorsey.com>; david.armstrong4@gmail.com

Subject: RE: [EXTERNAL] RE: Doxtator et al v. O'Brien et al Discovery

Good Morning Counsel,

I am providing possible dates for the Brown County witness depositions as follows.

Kevin Smith – June 3 or June 4

Jason Katers – June 3, June 4 (after 1:30 pm); June 9 (after 1:30 pm)

Nathan Winistorfer - only available on June 4

Joseph Mleziva – 6/4 at 1:00 p.m.

Logan Rose – June 3, June 4, June 9

I am still waiting for a response from Deputy Nelson and will provide available dates once they are received.

It is our understanding that the County has video conferencing capabilities; however, they are not open to using Zoom or any other unsecured program but will work with a court reporting service.

Thank you.

LINDA M. BRENT | Legal Assistant to Attorney William W. Ehrke,

Attorney Benjamin A. Sparks and Attorney George S. Peek

CRIVELLO CARLSON, S.C.

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From: forrest@dorsey.com <forrest@dorsey.com>
Sent: Friday, May 15, 2020 9:33 AM
To: jmb@guntalaw.com; Sparks, Ben A. <BSparks@CrivelloCarlson.com>; acw@guntalaw.com; jaw@guntalaw.com; gig@guntalaw.com; Hall, Samuel C. <SHall@CrivelloCarlson.com>; Castro, Jose A. <JCastro@CrivelloCarlson.com>
Cc: durocher.skip@dorsey.com; david.armstrong4@gmail.com
Subject: RE: [EXTERNAL] RE: Doxtator et al v. O'Brien et al Discovery

Hi everyone,
Just picking this thread back up, I still haven't received any potential dates for depositions or heard back from Brown County regarding ADR. Please let me know.
Thanks,
Forrest

From: forrest@dorsey.com <forrest@dorsey.com>
Sent: Tuesday, May 5, 2020 8:37 AM
To: Jasmyne Baynard <jmb@guntalaw.com>; BSparks@CrivelloCarlson.com; Ann Wirth <acw@guntalaw.com>; John Wolfgang <jaw@guntalaw.com>; Gregg Gunta <gig@guntalaw.com>; SHall@CrivelloCarlson.com; JCastro@CrivelloCarlson.com
Cc: durocher.skip@dorsey.com; david.armstrong4@gmail.com
Subject: RE: [EXTERNAL] RE: Doxtator et al v. O'Brien et al Discovery

Thanks Jasmyne. I do not see why redactions need to hold up the document production. As I believe I have stated before, I think the only appropriate redaction is attorney-client privilege. If there are other redactions, I am just going to ask for unredacted copies. In particular, I would view redacting names as inappropriate, because I would be entitled to contact those people for third party discovery. If there is information that you believe is confidential, just mark the document itself confidential as contemplated by the protective order.

I would anticipate any ADR would be conducted by telephone or through Zoom.

I am pretty open for depositions except for May 28-June 2.

From: Jasmyne Baynard <jmb@guntalaw.com>
Sent: Tuesday, May 5, 2020 8:27 AM
To: Tahdooahnippah, Forrest <forrest@dorsey.com>; BSparks@CrivelloCarlson.com; Ann Wirth <acw@guntalaw.com>; John Wolfgang <jaw@guntalaw.com>; Gregg Gunta <gig@guntalaw.com>; SHall@CrivelloCarlson.com; JCastro@CrivelloCarlson.com
Cc: Durocher, Skip <durocher.skip@dorsey.com>; david.armstrong4@gmail.com

Subject: RE: [EXTERNAL] RE: Doxtator et al v. O'Brien et al Discovery

Forrest and Ben,

I've been following the email chain.

Rule 30(b)(6) Notice: I have a call with my clients this morning and will hopefully get dates circulated by the end of the week for the Rule 30(b) Notice (although I think you may have already deposed the people who possess this information).

City's Discovery Responses: I have the responses done and the documents prepared, but there is a lot of redacting that needs to be done, specifically, the names of witnesses/individuals who made complaints/gave statements for any use of force report. Further, the breath of the request for production regarding the topics in the Rule 30(b) Notice is extremely vague and reads more like an interrogatory. I will send you the completed responses with the docs we've redacted this week, and just note that additional documents may be coming and/or we will supplement.

ADR: Do you anticipate mediation will be conducted remotely via telephone/zoom/etc.? If so we have open availability during the month of May (excluding May 28th/29th) so I will defer to the other parties for dates. Also, no objection to mediation in front of a magistrate.

Additional Witness Depositions: Please also provide dates that would work to reschedule the Depositions of Tubby's Mother/Aunt and Girlfriend for mid-June.

Jasmyne M. Baynard, Esq.

Attorney at Law

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From: forrest@dorsey.com <forrest@dorsey.com>

Sent: Monday, May 4, 2020 7:48 PM

To: BSparks@CrivelloCarlson.com; Ann Wirth <acw@guntalaw.com>; John Wolfgang <jaw@guntalaw.com>; Gregg Gunta <gig@guntalaw.com>; Jasmyne Baynard <jmb@guntalaw.com>; SHall@CrivelloCarlson.com; JCastro@CrivelloCarlson.com

Cc: durocher.skip@dorsey.com; david.armstrong4@gmail.com

Subject: RE: [EXTERNAL] RE: Doxtator et al v. O'Brien et al Discovery

Ok, thanks for getting those dates.

We may be misunderstanding each other, but I don't know how much clearer I could be—if you discover new material facts that support your contentions, you have an obligation under Rule 26(e) to supplement your answers within a reasonable time frame. That's what Plaintiffs say they will do in their answers. You cannot bring in new facts at summary judgment without supplementing your interrogatory answers, which is what it sounds like you want to do based on your answers and which defeats the entire purpose of contention interrogatories.

From: Sparks, Ben A. <BSparks@CrivelloCarlson.com>

Sent: Monday, May 4, 2020 5:31 PM

To: Tahdooahnippah, Forrest <forrest@dorsey.com>; acw@guntalaw.com; jaw@guntalaw.com; gig@guntalaw.com; jmb@guntalaw.com; Hall, Samuel C. <SHall@CrivelloCarlson.com>; Castro, Jose A. <JCastro@CrivelloCarlson.com>

Cc: Durocher, Skip <durocher.skip@dorsey.com>; david.armstrong4@gmail.com

Subject: RE: [EXTERNAL] RE: Doxtator et al v. O'Brien et al Discovery

Hi Forrest,

Yes, you're correct—thanks for the reminder. We'll also work on getting dates for Rose, Nelson, Smith, Winsterfer, and Mleziva.

For the contention interrogatory responses, I think we might be misunderstanding each other. If there's a specific deficiency in our responses that you believe needs to be fixed, let's meet and confer on that issue. My point in my prior e-mail was just that our reservation of rights to present facts and evidence outside of what's described in our discovery responses is based on the text of the Advisory Comments to Rules 26 and 33, and the fact that discovery is still ongoing. The plaintiffs made a similar reservation of rights in their responses to our interrogatories, which I think is appropriate, given where we are in discovery. Unless there's a particular deficiency in our responses you're wanting to discuss now, it might make more sense to meet and confer at the close of discovery to discuss the completeness of all parties' various responses.

Thanks much,

Ben



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From: forrest@dorsey.com <forrest@dorsey.com>

Sent: Monday, May 4, 2020 5:11 PM

To: Sparks, Ben A. <BSparks@CrivelloCarlson.com>; acw@guntalaw.com; jaw@guntalaw.com; gig@guntalaw.com; jmb@guntalaw.com; Hall, Samuel C. <SHall@CrivelloCarlson.com>; Castro, Jose A. <JCastro@CrivelloCarlson.com>

Cc: durocher.skip@dorsey.com; david.armstrong4@gmail.com

Subject: RE: [EXTERNAL] RE: Doxtator et al v. O'Brien et al Discovery

I thought we had notice a few jailers too, but in any event, please provide dates for all the depositions we discussed, which I believe were Rose, Nelson, Cpl. Smith, Winisterfer, and Mleziva.

As for the interrogatories, I find it remarkable that you disagree that the County has a duty to supplement its responses to contention interrogatories as discovery proceeds. If the County learns of additional material facts in discovery that support its contentions, then its prior responses are by definition "incomplete." If there is a needle in a haystack, like a document that is produced, this does not satisfy the obligation of responding to the interrogatory as you seem to imply, because the fact that the County will be using it to support its contention has not been made known. That position is antithetical to the entire purpose of contention interrogatories. If the County presents material facts in support of its contentions for the first time at summary judgment or trial, Plaintiffs will move to strike.

From: Sparks, Ben A. <BSparks@CrivelloCarlson.com>

Sent: Monday, May 4, 2020 5:03 PM

To: Tahdooahnippah, Forrest <forrest@dorsey.com>; acw@guntalaw.com; jaw@guntalaw.com; gig@guntalaw.com; jmb@guntalaw.com; Hall, Samuel C. <SHall@CrivelloCarlson.com>; Castro, Jose A. <JCastro@CrivelloCarlson.com>

Cc: Durocher, Skip <durocher.skip@dorsey.com>; david.armstrong4@gmail.com

Subject: [EXTERNAL] RE: Doxtator et al v. O'Brien et al Discovery

Hi Forrest,

We'll work to get dates on the Rule 30(b)(6) deposition for the County and circulate those soon (as far as I know, that's the only County deposition you've noticed). I may need to follow up with you in the meantime to clarify some of the topics you've identified. As for mediation, I believe you're right that our deadline is June 1—we probably should have shifted that date in our stipulation to extend the scheduling order so that it tracked our new schedule for the case. Either way, we'll confer with

our clients about mediation, and we'll work on getting some dates, as well as suggestions for mediators.

For our responses to the plaintiffs' contention interrogatories, I disagree that Rule 26(e) prevents us from reserving our right to later present facts and evidence learned in discovery that aren't explicitly stated in the responses to those interrogatories. First, I don't think you've correctly stated the obligation to supplement under Rule 26(e). The 1993 Advisory Comment to Rule 26(e) states:

The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

Second, I don't believe that interrogatory responses providing facts in support of particular contentions have to (or even can) reflect all of the proof that a responding party will offer at trial—as long as that proof is drawn from information available to everyone in discovery. The 1970 Advisory Comment to Rule 33(b) states:

The general rule governing the use of answers to interrogatories is that under ordinary circumstances they do not limit proof. Although in exceptional circumstances reliance on an answer may cause such prejudice that the court will hold the answering party bound to his answer, . . . the interrogating party will ordinarily not be entitled to rely on the unchanging character of the answers he receives and cannot base prejudice on such reliance.

Based on those Advisory Comments, I believe the reservation of rights in our objections to the contention interrogatories essentially memorialize what's already the law under Rules 26(e) and 33(b): by responding to the plaintiffs' contention interrogatories, we're not implicitly agreeing that our responses contain the entire universe of facts and evidence learned in discovery that we may rely on to support our contentions at summary judgment and trial. Lastly, notwithstanding our reservation of rights (and our other objections), I believe we provided complete and accurate responses to the questions posed based on the information available in discovery to date.

If I misunderstood your position or if I'm missing something else, please let me know so we can talk through it to get on the same page.

Thanks much,

Ben



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From: forrest@dorsey.com <forrest@dorsey.com>

Sent: Friday, May 1, 2020 10:47 AM

To: acw@guntalaw.com; jaw@guntalaw.com; gig@guntalaw.com; jmb@guntalaw.com; Hall, Samuel C. <SHall@CrivelloCarlson.com>; Sparks, Ben A. <BSparks@CrivelloCarlson.com>; Castro, Jose A. <JCastro@CrivelloCarlson.com>

Cc: durocher.skip@dorsey.com; david.armstrong4@gmail.com

Subject: Doxtator et al v. O'Brien et al Discovery

Hi everyone,

I am writing to check in regarding discovery. Things are still in lockdown but the tea leaves seem to indicate that after a few weeks the strings will start to be loosened. This puts me in a position to be able to at least take the depositions remotely. Please provide dates for all noticed depositions (including the Rule 30(b)(6) depositions).

In addition, with respect to the County's discovery responses, I note that the county reserved the right to present additional facts at trial or summary judgment. I do not think this is permitted under Rule 26(e)—if you have additional facts, you have to supplement or amend your responses. Please confirm that you intend to comply with Rule 26(e).

With respect to the City's discovery responses, I am still waiting on its document product, when will documents and a privilege log be produced?

Finally, I believe that we have an ADR deadline of June 1. I favor requesting a magistrate judge. Please let me know (1) whether you concur in requesting a magistrate and (2) when you are available.

Thanks,
Forrest

Forrest K. Tahdooahnippah

Partner



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